



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: InterTrade Industries, Ltd.

File: B-225702

Date: June 3, 1987

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### DIGEST

Bid that included one price for the base quantity and increased prices for out year requirements, in derogation of solicitation provision providing that prices for out year requirements are not to exceed price for base quantity, may be considered notwithstanding solicitation provision stating that such bids will be nonresponsive where the record shows that the second-low bid would not have been low, even if the bidder were permitted to unlevel its bid in the same manner.

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### DECISION

InterTrade Industries, Ltd. protests the award of a contract to Lavelle Aircraft Company under invitation for bids (IFB) No. DAAH01-86-B-A492, issued by the U.S. Army Missile Command, Redstone Arsenal, Alabama. InterTrade contends that Lavelle did not comply with an express solicitation provision regarding pricing and, accordingly, should have been rejected as nonresponsive. We deny the protest.

The solicitation, issued on August 21, 1986, contemplated the award of a fixed-price contract for an estimated quantity of 287, plus a contractor tested first article "Nacelle Assembly, FW." <sup>1/</sup> The IFB contained line items covering an estimated additional 287 units a year for the next 4 program years; award was to be made to the aggregate low bidder for all years. Further, the IFB instructed bidders that while unit prices for the "out year estimates" need not be the same, they must be no more than the unit price for the current year. The solicitation also stated that bidders not complying with this provision would be rejected as nonresponsive.

The procuring activity received three bids in response to this solicitation. Lavelle, bidding unit prices of \$276 for

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<sup>1/</sup> The agency advises us that this is a forward cowling (housing) for the TRI-60 target engine.

the base quantity, \$261 for program year 1, \$282 for year 2, \$304 for year 3, and \$328 for year 4, was the apparent low bidder with an aggregate price of \$416,437. InterTrade, bidding a unit price of \$350 for the base quantity, as well as for each of the 4 program years, was second-low with an aggregate bid of \$502,250. The contracting officer initially determined that, due to its pricing scheme, Lavelle was nonresponsive and advised InterTrade that it was the apparent low bidder. However, after further evaluation in consultation with the procuring activity's legal office, the agency determined that other bidders would not be prejudiced by acceptance of Lavelle's bid. Consequently, award was made to Lavelle on January 27, 1987.

The sole issue here is the effect of Lavelle's noncompliance with the solicitation provision specifying that unit prices for out year requirements be no higher than the base quantity prices. InterTrade maintains that the provision requires the contracting officer to reject Lavelle's bid as nonresponsive.

The Army responds that it accepted the bid in reliance on our Office's decisions regarding the effect of noncompliance with "level pricing" provisions, citing Keco Industries, Inc., 64 Comp. Gen. 48 (1984), 84-2 CPD ¶ 491, and Arcwel Corp., B-219961, Dec. 27, 1985, 85-2 CPD ¶ 722. These decisions hold that a bidder's failure to comply with such a provision, i.e., a term generally requiring constant prices for items to be procured over the entire course of a contract, does not automatically preclude consideration of the bid, but rather depends upon whether such noncompliance is prejudicial to other bidders. Where no prejudice is found, we have held that the bids, although technically non-responsive, nevertheless should be considered.

InterTrade argues that unlike the present situation, none of these cases dealt with a solicitation expressly providing that bids not prepared in accord with a pricing requirement would be deemed nonresponsive. A more analogous case, InterTrade maintains, is International Harvester Co., B-212341, Sept. 12, 1983, 83-2 CPD ¶ 313. The IFB at issue in that case contained a Multi-Year Procurement clause requiring that unit prices for each vehicle to be procured be constant for all program years and warning that noncompliant bids would be deemed nonresponsive. InterTrade argues that our decision did not address the effect of this warning, but instead focused on the discrepancy in the unit prices of the low bidder, which were \$42,009 for the first year and \$42,000 for the second and third years. In view of this minor variation, InterTrade states, we held that the low bidder's noncompliance with the pricing clause was

"properly waivable as an apparent clerical error and minor informality."

The clause at issue in the International Harvester case is indistinguishable from the one with which we are now confronted. Our Office in fact construed the effect of the clause and rejected the same argument now raised by Inter-Trade, namely that prior decisions dealing with level pricing provisions were inapplicable because the solicitations involved failed to state that noncompliant bids would be deemed nonresponsive. (In Keco Industries, Inc., 64 Comp. Gen. supra, the contracting officer had included the warning in a clarifying letter to bidders). Regardless of the presence of an explicit solicitation provision, we considered the critical question to be whether the unlevel pricing worked to the prejudice of other bidders. If we did not find any prejudice, acceptance of the low bid was not legally objectionable.

This decision is consistent with the concept of bid responsiveness, that is, whether a bidder has unequivocally offered to provide exactly what is called for in a solicitation. See Provost's Small Engine Service, Inc., B-215704, Feb. 4, 1985, 85-1 CPD ¶ 130. The concept evolved out of a need to satisfy two divergent requirements. The first is that procuring activities must be assured of acquiring goods or services that will satisfy their needs, see Johnson Moving & Storage Co., B-221826, Mar. 19, 1986, 86-1 CPD ¶ 273, and the second is that all potential bidders must be assured of competing on an equal basis, see Kentucky Building Maintenance, Inc., B-215397, Dec. 19, 1984, 84-2 CPD ¶ 383. When either of these two requirements are not met as a consequence of a bidder failing to comply with a material solicitation term, the bid must be rejected. Where, however, such nonconformance does not work to the detriment of the government and is not prejudicial to other bidders, the bid is not precluded from consideration.

Such is the case here. The purpose of the pricing provision included in this IFB was to prevent bidders from lowering their prices for the base quantity and inflating their prices of the out year requirements to the detriment of the government. See Keco Industries, Inc., 64 Comp. Gen. supra. Although Lavelle did not comply with this provision, acceptance of its unlevel bid was still most advantageous to the government, as the highest of its unit prices, \$328 for the fourth program year, was significantly less than Intertrade's level unit price of \$350.

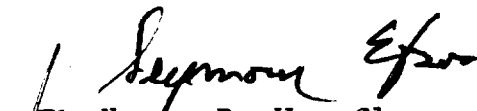
Moreover, Intertrade was not prejudiced by Lavelle's actions. Bidders are only prejudiced by unlevel pricing if they could have become low by bidding in the same manner,

that is, by also unleveling their prices. See Kitco, Inc., B-221386, Apr. 3, 1986, 86-1 CPD ¶ 321. InterTrade has made no attempt to demonstrate that its offer would have been more advantageous than Lavelle's if it had also submitted unlevel unit prices. Our own analysis reveals no conceivable manner in which such a change in pricing would have improved InterTrade's relative standing. InterTrade's aggregate bid exceeded Lavelle's by \$85,813. Even assuming that InterTrade's level price of \$350 per unit figure reflected its projected costs for the fourth program year, and that the prices for the other years would have been less but for the level pricing requirement, to overcome Lavelle's price advantage InterTrade would have had to lower its per unit price for the remaining requirements by an average of approximately \$75.2/. We have no reason to believe that InterTrade could have lowered its prices by such a significant amount. See Arcwel Corp., B-219961, supra.

Accordingly, rejection of Lavelle's bid for its noncompliance with a material term of the solicitation is not warranted.

InterTrade also argues that the Army's acceptance of Lavelle's bid effectively afforded Lavelle "two bites at the apple" in that, after opening, the firm had an option either to accept or reject award; according to the protester, Lavelle could have argued that its bid was not responsive or, alternatively, that its failure to comply with the pricing requirements should be waived. We find this argument to be without merit. Lavelle's bid constituted a binding offer to perform at the terms stated in the bid and, as specified in the IFB, it was not revocable for a period of 60 days from the date of bid opening. Acceptance of this offer, thus resulting in the formation of a binding contract, was dependent solely upon the determination of the contracting officer that Lavelle was the low, responsive, responsible bidder.

The protest is denied.

  
Harry R. Van Cleve  
General Counsel

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2/ In calculating this amount, we divided the difference between InterTrade's and Lavelle's bids, \$85,813, by the remaining requirements, 1,148 units.